



REPUBLIC OF KENYA



**Gora Technical Services Limited & 3 others v Registrar of
Companies & another (Miscellaneous Suit E156 of 2022)
[2023] KEHC 26181 (KLR) (Commercial and Tax) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS SUIT E156 OF 2022
JWW MONG'ARE, J
NOVEMBER 23, 2023**

BETWEEN

**GORA TECHNICAL SERVICES LIMITED 1ST APPLICANT
GEORGE OUMA ARODI 2ND APPLICANT
DAVID GILBERT OTIENO 3RD APPLICANT
RUTH AUMA AGENDA 4TH APPLICANT**

AND

**REGISTRAR OF COMPANIES 1ST RESPONDENT
MS QIN CAIPING 2ND RESPONDENT**

RULING

1. The Applicants have by a Notice of Motion application moved this court under section 118, 164, 165 and 166 of the *Companies Act*, Section 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders:-
 1. Spent
 2. That this Honourable Court be pleased to direct the 1st Respondent to rectify the Company Register of Gora Technical Services Limited by returning it to the former position of the Applicant 's names as shareholders.
 3. That the Honourable Court be pleased to direct the 1st Respondent to delete the name of the 2nd Respondent as shareholder and director of the 1st Applicant.



4. That any acts, conduct and/or activities so far performed by the 1st Respondent on behalf of Gora Technical Services Limited as directors and/or shareholders be declared null and void.
 5. That costs of this application be provided for.
2. The application is supported on the grounds set within it and a supporting affidavit of George Ouma Orodhi the 2nd Plaintiff. Upon being served with the Application the 2nd Respondent raised a preliminary objection and filed the Notice of the Preliminary Objection dated 31st November 2022 on the following grounds:-
1. That the application offends section 863(1) of the *Companies Act* contemplates that its aggrieved party would file a normal action for determination rather than an application as was contemplated under section 118 of the old Companies Cap 486(now repealed).
 2. That the application is premature since this is not a proper case to be determined summarily.
 3. That the application is incompetent, bad in law and therefore an abuse of the Court process.
3. The 2nd Respondent also filed a Replying Affidavit sworn on 27th October 2022.
4. It is the Applicant 's case that the shareholders, upon an agreement entered between themselves and the 2nd Respondent, relinquished and transferred 700 shares of the 1st plaintiff to the 2nd Respondent for a consideration of Kenya Shillings 2.4 million. That to facilitate the transfer of the said payment from her foreign Bank, the 2nd Respondent required that the transfer be effected and a CR12 be generated reflecting her name as a shareholder director to facilitate the release of funds to the Company. The Applicant argue that they did their part but the 2nd Respondent failed to complete the transaction but effectively took over the running of the 1st Plaintiff.
5. In an attempt to regain control of the Company, the Applicant s wrote to the 1st Respondent and had the transfer rescinded. Upon being notified of the changes, the 2nd Respondent wrote to the Registrar to cancel the purported resignation and return her back to the company as a shareholder as the purported removal, she alleged, was done fraudulently.
6. The application before the court has been brought by the Applicants seeking a rectification of the register and removal of the 2nd Respondent as shareholder and director of the 1st plaintiff.
7. The Respondent has raised a Preliminary objection to the application as filed. I note from the pleadings the suit has been filed a miscellaneous application commenced by way of a Notice of Motion. In the locus classica case on Preliminary objections, *Mukisa Biscuit Manufacturing Vs. West End Distributors Ltd* (1969) EA 696 the court held as follows:-
- “ A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are objection to jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
8. The preliminary objection raised by the 2nd Respondent is to the effect that the application as filed offends section 863 of the *Companies Act*. In the Preliminary Objection raised the 2nd Respondent argues that the Applicant s have moved to court by way of a Notice of Motion as opposed to a substantive suit. In addition, she further contends that the issues sought to be determined by the court



cannot be summarily decided by way of affidavit and that parties need to call evidence to satisfy the court the need for the orders sought.

9. Order 3 rule 1 of the [Civil Procedure Rules](#) provides as follows:-

“(1) Every suit shall be instituted by presenting a plaint to the Court, or in Such other manner as may be prescribed.” I note that the Applicants have moved the court under section 863 of the [Companies Act](#). The said section 863 provides as follows:-

“863. Rectification of the Register under Court order

- (1) The Registrar shall remove from the Register any entry—
 - (a) that derives from anything that the Court has declared to be invalid or ineffective, or to have been done without the authority of the company; or
 - b) that the Court has declared to be factually inaccurate; or to be derived from something that is factually inaccurate or is forged, and that the Court has directed to be removed from the Register.
- (2) The Court shall specify in the order the entry that is to be removed from the Register and indicate where in the Register it is to be found.
- (3) The Court may not make an order for the removal from the Register of any entry the registration of which had legal consequences as mentioned in section 861(3) unless it is satisfied—
 - (a) that the presence of the entry in the Register has caused, or may cause, damage to the company concerned; and
 - (b) that the company’s interest in removing the entry outweighs the interest (if any) of other persons in the continued appearance of the entry in the Register.
- (4) If, in such a case, the Court makes an order for removal, it may make such consequential orders as appear just with respect to the legal effect (if any) to be accorded to the entry because it has appeared in the Register.
- (5) The Court shall ensure that a copy of its order is sent to the Registrar for registration.
- (6) This section does not apply in respect of an entry in the Register if the Court has other specific powers under this Act to deal with the matter.”

10. Flowing from the above provisions of the [Companies Act](#), I am persuaded that the prayers sought in the miscellaneous Application as filed herein cannot be issued without the parties being first heard and evidence produced by either side to determine if the register should be rectified and why. I am therefore



persuaded that the Preliminary objection has merit and I shall allow it. I therefore find and hold that the Application as filed is incompetent and the same cannot be determined as the issues canvassed therein and sought to be determined cannot be summarily determined without calling of evidence by the parties. The same contravenes the provisions of the Civil Procedure Rules in the manner provided for bring substantive issues for determination by a court. I find that the application lacks merit. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Ojong'a holding brief for Saende for the Respondent.

No appearance for the Applicant.

AMOS - COURT ASSISTANT

